IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEONARD L. KIMBLE	:	
Plaintiff,	:	
	:	**CIVIL ACTION NO. 02-CV-9359**
v.	:	
	:	
MORGAN PROPERTIES	:	
Defendant.	:	

MEMORANDUM AND ORDER

Tucker, J. **October 25, 2005**

Presently before the Court is Plaintiff's Motion for a New Trial and Arrest of Judgment (Doc. 88). On September 12, 2005, a jury trial commenced with regard to Plaintiff Leonard Kimble's claim that Defendant Morgan Properties terminated his employment in retaliation for his complaints of racial discrimination. The jury returned a verdict in favor of Morgan Properties on September 15, 2005; judgment was entered on September 19, 2005. Pursuant to Federal Rule of Civil Procedure Rule 59 ("Rule 59"), Plaintiff has timely filed the instant motion for new trial on September 26, 2005, within the prescribed ten (10) days after entry of the judgment. FED. R. CIV. P. R. 59(b). For the reasons set forth below, upon consideration of Plaintiff's Motion and Defendant's Response (Doc. 91), the Court will deny Plaintiff's Motion.

BACKGROUND

The principle issue in this case as to Defendant's liability was whether "by a preponderance of the evidence that the Plaintiff's complaint about racial discrimination was a substantial motivating factor in the Defendant's decision to discharge the Plaintiff," or alternatively whether "[Defendant] Morgan Properties would have discharged Plaintiff for his refusal to perform on-call duties regardless of any protected activity." (Verdict Sheet at 1-2.)

At trial, Plaintiff Kimble argued to jurors that (1) he engaged in conduct protected by Title VII by complaining to his employer of unfair and improper treatment owing to his status as an African American employee; (2) that the Defendant personally and intentionally took adverse action against the Plaintiff by terminating his employment; and (3) that the protected conduct motivated the Defendant's adverse action in violation of 42 U.S.C. § 2000e-3(a) ("Title VII"), 43 PA. STAT. 955 (Pennsylvania Human Relations Act ("the PHRA")), and 42 U.S.C. § 1981.

Defendant contended that it was Plaintiff's direct, face-to-face refusal to perform job-related on-call duties as instructed by his supervisor, and a less than favorable disciplinary record, not his protected activity, that motivated Defendant's decision to terminate Plaintiff.

Jurors found that Morgan Properties did not act in violation of Title VII, the PHRA, or 42 U.S.C. § 1981 when it discharged Kimble for non-retaliatory reasons, rejecting Plaintiff's argument that his uncontroverted refusal to perform on-call duties and disciplinary record were pretext for his discharge.

Following this verdict in favor of Defendant Morgan Properties, Plaintiff Kimble contends that the Court erred in (1) granting the defense Motion for Summary Judgment (Doc. 42, filed Nov.

8, 2004);[1] (2) not allowing Plaintiff to present exhibits and question witnesses concerning events that occurred after Plaintiff's termination; (3) not allowing Plaintiff to question Greg Bailey concerning his testimony that he had not been demoted; (4) not allowing Plaintiff to question Bob Alexander concerning a letter reference he wrote on Plaintiff's behalf; and (5) not allowing Plaintiff to question witnesses or present evidence relating to an Equal Employment Opportunity ("EEO") Report prepared by Defendant.

LEGAL STANDARD

Rule 59 provides that a court may grant a new trial to any party on all or part of the issues in an action in which there has been a trial by jury. Under this rule, a court, in the exercise of discretion, may grant a new trial if, inter alia, the jury's verdict was against the weight of the evidence, or if substantial errors occurred in the admission or exclusion of evidence or in the charge of the jury. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). The standard to be applied by the court varies according to the grounds for which relief is sought under Rule 59. See Henry v. Hess Oil Virgin Islands Corp., 163 F.R.D. 237, 242 (D.V.I. 1995).[2] Accordingly, when a

[1]This Court granted Defendant's Motion for Summary Judgment as to Counts II and III of Plaintiff's Amended Complaint (Doc. 17, filed June 6, 2003), and entered judgment in favor of Defendant and against Plaintiff on Count II of the Amended Complaint for Racial Discrimination and Count III of the Amended Complaint for Age Discrimination at that time.

[2]In this case, Plaintiff seeks relief under Rule 59 on the grounds that the Court erred in the exclusion of evidence at trial, and in its pre-trial grant of summary judgment in Defendant's favor. Plaintiff has not argued that the jury verdict was against the weight of evidence. (See Pl's Mem. in Support of Mot.) In general, courts will sustain jury verdicts if, drawing all reasonable inferences in favor of the prevailing party, there is a reasonable basis to uphold the verdict; courts will examine the record for evidence that could reasonably have led to the jury's verdict. See Nissim v. McNeil Consumer Products Co., 957 F. Supp. 600, 602-04 (E.D. Pa. 1997). As Plaintiff has not sought relief on the grounds that the jury's verdict was against the weight of the evidence, it is appropriate for this Court to exercise its discretion accordingly.

motion for a new trial is premised on a ground other than that the verdict was against the weight of evidence, the trial court has much greater discretion. Id.

DISCUSSION

A. Grant of Summary Judgment

In his Motion, Plaintiff argues thathe is entitled to a new trial because the Court erred in granting the Defendant's Motion for Summary Judgment on Plaintiff's race discrimination and age discrimination claims.[3] (Pl.'s Mem. in Supp. of Mot. 3.) Plaintiff nicely sets forth a thorough exposition of the last forty-three years of the law of summary judgment practice in the federal courts. Plaintiff also sets forth a breadth of factual conjecture that speaks to questions of pretext on the part of a defendant in a hypothetical discrimination claim, where the plaintiff has established a prima facie case. Unfortunately, Plaintiff Kimble has failed to account in the present challenge to this Court's grant of partial summary judgment for his failure to produce evidence at the summary judgment stage sufficient to make a prima facie showing of race or age discrimination in his case.

As Plaintiff recognizes in the instant Motion (Pl.'s Mem. in Supp. of Mot. 5), actions brought pursuant to Title VII, the PHRA, or 42 U.S.C. § 1981 should be evaluated pursuant to the three-step

[3]As previously stated, Rule 59 permits the grant of a new trial following entry of judgment where the jury's verdict was against the weight of the evidence, or if substantial errors occurred in the admission or exclusion of evidence or in the charge of the jury. It is not entirely clear from the Memorandum of Law in Support of Plaintiff's Motion for New Trial and Arrest of Judgment (Doc. 87) precisely how the Court's prior grant of summary judgment equates a jury verdict against the weight of the evidence or substantial error in an evidentiary ruling or charge of the jury. Even assuming the grant of summary judgment to have been tantamount to an erroneous evidentiary ruling, it is not clear from Plaintiff's Memorandum precisely why, in that case, he failed to petition the Court to reconsider its grant of summary judgment, or seek any other relief or revision of the order at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Nonetheless, this Court, in its discretion, will entertain Plaintiff's instant Motion in its entirety.

analysis articulated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972). Specifically, to establish a prima facie case for race or age discrimination under Title VII, PHRA, or 42 U.S.C. § 1981, a plaintiff must show (1) thathe is a member of a protected class, (2) that he was qualified for the position in question, (3) that he suffered an adverse employment decision, and (4) that these circumstances give rise to an inference of unlawful discrimination by showing that similarly-situated individuals who are not in the protected class were treated more favorably.

Kimble, a member of a protected class who offered credible evidence that he was both qualified for the position in question and subjected to an adverse employment decision, advanced no credible evidence to allow any reasonable inference, even when viewed in the light most favorable to him, of any similarly-situated comparators not in the protected class who were treated more favorably. Specifically, this Court found in granting summary judgment in Morgan Properties' favor that Kimble had failed to make a prima facie showing of discrimination on the basis of race or age because he failed to offer any evidence to satisfy the fourth element of the claim–evidence of similarly-situated comparators who were treated more favorably.

Upon finding no genuine issue of material issue of fact between the parties as to establishing a prima facie case for race or age discrimination, the Court entered summary judgment in favor of the Defendant.[4] Without offering any actual argument in the instant Motion that there existed

[4]Under the Federal Rules, a partial summary judgment is a pretrial adjudication, interlocutory in character, and therefore not appealable unless a particular statute allows an appeal from the order involved, courts have established that the particular nature of the summary judgment would warrant appeal, or the entry of a partial final judgment, pursuant to Federal Rule of Civil Procedure Rule 54 (b), makes the ruling appealable. FED R. CIV. P. R. 56 (d) and Advisory Committee Notes. As the instant grant of summary judgment does not fall within any of the stated exceptions, Plaintiff's present appeal of the earlier grant of summary judgment is timely.

credible evidence of similarly-situated comparators for the Court to consider when making its summary judgment ruling, Plaintiff seeks now to attack the propriety of the grant of summary judgment.

As a matter of fact, Plaintiff in his instant Motion continues to fail to present any evidence of similarly-situated individuals outside the protected class who were treated more favorably than he was, and instead attempts to shift focus from the non-existence of any genuine issue of material fact to a defense burden that cannot be reached, as a matter of law, unless and until Plaintiff has satisfied his own prima facie burden of proof, as a matter of fact. Instead, in his Memorandum of Law, Plaintiff states:

> The plaintiff, Leonard Kimble, was clearly qualified for the position. He was, [sic] capable of performing all the requirements of the job description (See Exhibit P-2(b)). All of his evaluations up to the point of the promotion rated him as a very good mechanic. (See Exhibits P-1(a) and P-1(c)). In the case of Pitre v. Western Electric Co., Inc., 843 F.2d 1262, 1271 (10th Cir. 1988), the court said, "The rejection of an otherwise qualified individual on the basis of subjective considerations entitle [sic] the plaintiff to the benefit of an inference of discrimination." See also Jackson v. University of Pittsburgh, 826 F.2d 230 (3rd Cir. 1987) and Josey v. John R.Hollingsworth Corp., 996 F.2d 632 (3rd Cir. 1993). Therefore, the plaintiff could prove a prima facie case.
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> The next step is for the defendant to offer a legitimate non-discriminatory reason for its decision. . . . The plaintiff, then must produce sufficient information from which a fact-finder could find that the reasons(s) offered by the defendant is a pretext for discrimination. . . . The plaintiff met this test. . . . Therefore, the court erred in granting the defendant's Motion for Summary Judgment on this claim.

(Mem. of Law in Supp. of Pl.'s Mot. 5-6.)

The Plaintiff has overlooked the requirement of showing similarly situated individuals who were not in the protected class who were treated more favorably. Accordingly he failed to establish

a prima facie case. Because Plaintiff did not establish a prima facie case of discrimination, and has not addressed any error by this Court at the summary judgment stage, the Court will deny Plaintiff's request to vacate the summary judgment entered on November 4, 2004.

B. Court's Evidentiary Rulings Excluding Evidence

1. Evidence Concerning Events Occurring After Plaintiff's Termination

Plaintiff contends that the Court erred during the trial of this matter in excluding evidence concerning "events which occurred *after plaintiff's termination*", and showed that a white employee "was treated more favorably than the plaintiff." (Mem. of Law in Supp. of Pl.'s Mot. 8) (emphasis added). Plaintiff believes that the Court erred in not allowing him to introduce evidence to show that a non-retaliatory reason given by Defendant for firing Plaintiff–that he directly refused an instruction from a supervisor–was pretext for an unlawful firing.

Defendant contends that the evidence was properly excluded because it concerned events occurring more than two years after Plaintiff's discharge, involved different supervisors, and concerned an employee who never, like Plaintiff, refused to perform on-call duties, and therefore, was not similarly-situated. (Def's. Mem. of Law in Opp. to Pl.'s Mot. 6.)

Again, the principle issue in this case as to Defendant's liability was whether "by a preponderance of the evidence that the Plaintiff's complaint about racial discrimination was a substantial motivating factor in the Defendant's decision to discharge the Plaintiff," or alternatively whether "[Defendant] Morgan Properties would have discharged Plaintiff for his refusal to perform on-call duties regardless of any protected activity." (Verdict Sheet at 1-2.) As demonstrated by the

verdict, the jury found Plaintiff's uncontroverted refusal to perform on-call duties[5] and disciplinary record were the reasons for his lawful discharge.

Because of the Court's prior ruling and entry of judgment in favor of Defendant on Plaintiff's discrimination claims, the sole issue at trial for the jury was Plaintiff's retaliatory discharge claim. As the evidence in question concerned events that occurred years after Plaintiff's termination and were not related to the circumstances surrounding Plaintiff's own termination, the Court finds that the evidence, conflating previously adjudicated claims of discrimination with Plaintiff's trial issue of retaliatory discharge, was properly excluded.

2. Trial Examination of Greg Bailey and Bob Alexander

Plaintiff contends that the Court erred in excluding a May 20, 2003 memo as evidence to impeach Greg Bailey's testimony that he was never demoted from his position as Assistant Maintenance Supervisor. (Mem. of Law in Supp. of Pl's. Mot. 11.)[6] Yet Plaintiff fails to articulate to the Court how a document describing a change in employment status of an employee other than himself (which took place almost three years after Plaintiff was terminated on July 11, 2000 from his employment with Morgan Properties and under objectively different circumstances than Plaintiff's own) was relevant to the jury question of whether Plaintiff was terminated, as Defendant

[5]Plaintiff has not endeavored at any point in the litigation to prove, argue, or suggest that he did not directly refuse to perform on-call duties when asked repeatedly to do so by his supervisor, or rebut defense evidence that he was informed immediately prior to his being fired that if he did not perform on-call duties he would be fired.

[6]The Court finds in the Exhibits for Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for New Trial and Arrest of Judgment (Doc. 90) a May 19, 2003 memo suggesting that Greg Bailey be moved to a non-supervisory position with a corresponding decrease in pay because "he truly is a team player . . . [but] lacks the leadership ability . . . ." (Ex. P-2(n).) This document makes no reference to Bailey's refusal to pull on-call duties. The Court will assume that this is the May 20, 2003 memo of which Plaintiff speaks in his Memorandum of Law.

argued and Plaintiff himself never denied, for refusing a direct mandate from a supervisor to pull on-call duties.

Plaintiff further contends that the Court erred in excluding a letter of reference ("Ex. P-12"), which he states was written by Bob Alexander ("Alexander") and not allowing Plaintiff to question Alexander with regard to his testimony inconsistent with this letter. Plaintiff states in his memorandum that the Court based its decision on the fact that the document had not been pre-numbered and exchanged prior to trial. Plaintiff relies on the language of this Court's Scheduling Order (Doc.24, filed September 11, 2003),[7] and insists that in spite of his compliance with this Order, the Court clearly erred in not allowing him to question the witness concerning the document.

Plaintiff is incorrect. The Court based its decision to exclude Ex. P-12 on statements from Plaintiff's counsel during the proceedings that the document had been discovered after the trial began.[8] Paragraph two of the above-referenced Scheduling Order makes it clear that "*no discovery*

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[7]Paragraph eleven of the Order provides:

> All trial exhibits, except for impeaching documents, shall be premarked and exchanged by counsel prior to the commencement of trial. At the commencement of trial, counsel shall supply the court with a bench copy of each exhibit, the duplication of which is practicable (two (2) copies in non-jury trials), and two (2) copies of a schedule of all exhibits which shall briefly describe each exhibit.
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> At the time of its use, counsel shall supply the court and opposing counsel with a copy of each impeaching document, the duplication of which is practicable. . . .

[8]Cross examination of witness Bob Alexander by Plaintiff's counsel, Mr. Nails:

Q: Mr. Alexander, did Mr. Kimble ever ask you for a letter of reference?
A: No.

Mr. Henry: May I approach, your Honor?
The Court: Yes.
(Sidebar conference as follows:)
Mr. Henry: Your Honor, we are going to object to the introduction of this letter. It's not marked as an exhibit. We were never provided with a copy of

may take place during the trial unless directed by the court." Obviously, the Court never directed any such discovery to take place. Moreover the document, which was mysteriously provided to counsel by Plaintiff the night before it was offered in court, was an undated letter on blank paper and not signed–factors that detract from its probative value as well as its credibility and trustworthiness. The exclusion of Ex. P-12 was proper.

3. Evidence Relating to EEO Report Prepared By Defendant Morgan Properties

Finally Plaintiff, who held a supervisory position prior to his termination, argues that the Court's refusal to allow into evidence undated, selected portions of an EEO Report prepared by Defendant (Ex. P-10), which indicated that Morgan Properties had no African American employees in supervisory positions, was in error. (Mem. of Law in Supp. of Pl's. Mot. 12.) While it is possible that the outer limits of logic might permit the Court to view this evidence as relevant to a discrimination claim, the issue for trial in this case was whether Defendant fired Plaintiff in retaliation for his protected conduct and not for any other proffered reason.

Plaintiff relies on the case of N.A.A.C.P. v. Town of Harrison for the proposition that a

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Mr. Nails's exhibits on the last day prior to trial, which is required. Where did this come from? We gave him a copy of our exhibits the day before just like your order required. We got no documents in return, and here I get this. What is this?

Mr. Nails: First of all, I mean I didn't intend to present this as evidence. I didn't have it. Mr. Kimble brought it in with him this morning. Secondly –

The Court: Then you can't admit it.

Mr. Nails: It's rebuttal.

The Court: It's not rebuttal. We are in the defense case.

(Open court)

Mr. Nails: I have no questions.

The Court: Thank you, sir. You may step down.

* * *

(Trial Tr. day 4, 18-19, Sept. 15, 2005.)

plaintiff may show pretext by showing that an employer previously discriminated against other persons within the plaintiff's protected class. 940 F.2d 792 (3rd Cir. 1991). But as Defendant accurately explains in its Opposition Memorandum (Def's. Mem. of Law in Opp. to Pl's. Mot. 10), N.A.A.C.P. v. Town of Harrison is a Title VII disparate impact discrimination action for which "[a] comparison between the racial composition of those qualified persons in the relevant labor market and that of those in the jobs at issue typically 'forms the proper basis for the initial inquiry in a disparate impact case.'" Id. at 798. Plaintiff's was an action for retaliatory discharge and the Court properly excluded the EEO Report.

CONCLUSION

In accordance with the foregoing, this Court will deny Plaintiff's Motion for a New Trial and Arrest of Judgment. An appropriate order follows.

BY THE COURT:

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Hon. Petrese B. Tucker, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEONARD L. KIMBLE	**:**	
Plaintiff,	**:**	
	:	**CIVIL ACTION NO. 02-CV-9359**
v.	**:**	
	:	
MORGAN PROPERTIES	**:**	
Defendant.	**:**	

ORDER

AND NOW, this _____ day of October, 2005, upon consideration of Plaintiff's Motion for a New Trial and Arrest of Judgment (Doc. 88), and Defendant's Response (Doc. 91), **IT IS HEREBY ORDERED and DECREED** that Plaintiff'sMotion for a New Trial and Arrest of Judgment is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of the Court shall mark the above-captioned case **CLOSED**.

BY THE COURT:

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